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No. 87-92

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANR GASIFICATION PROPERTIES COMPANY, ETC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the North Dakota redemption statute applies to the foreclosure in this case.

1. Petitioner is one of five general partners in Great Plains Gasification Associates (Great Plains). The partnership was formed for the purpose of constructing, owning, and operating the Great Plains Coal Gasification Plant (Project) in Mercer County, North Dakota, which converts lignite coal into synthetic natural gas (Pet. App. 3A).

The Project was financed in large part by a loan of approximately $1.5 billion, secured by a mortgage on virtually all partnership assets from the Federal Financing Bank (Pet. App. 3A). Section 13.04 of the individually negotiated mortgage agreement provides that the rights and obligations of the parties to the mortgage are to be governed by federal law, and Section 13.03 states that " '[t]o the full extent it may legally do so, Borrower hereby expressly waives any and all rights of redemption from sale under order or decree of foreclosure of this Mortgage * * *' " (Pet. App. 3A, 24A; C.A. App. 118-119). The

Department of Energy (DOE) guaranteed the loan pursuant to the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. (& Supp. III) 5901 *et seq.* (the Act).[1]

Simultaneously with the signing of the mortgage and loan guarantee agreement, four gas pipeline companies, affiliates of the Great Plains partners, entered into separate long-term Gas Purchase Agreements with Great Plains, in which they agreed to take or pay for the synthetic gas produced from the Project (Pet. App. 13A). Each agreement provided that, upon Great Plains' default, the trustee under the mortgage would have the right to succeed to Great Plains' rights under the agreement (C.A. App. 164). The pipelines also entered into agreements directly with DOE, in which they agreed that if Great Plains defaulted, DOE could notify them under the Gas Purchase Agreements and reinstate those agreements with the pipelines (C.A. App. 169-173).

On August 1, 1985, Great Plains defaulted on its payment obligation, and DOE took over the Project (Pet. App. 4A).[2] DOE directed the Project administrator to continue operating the plant, and advised the pipelines that it was substituting the Secretary of Energy for Great Plains as the seller in the Gas Purchase Agreements (*id.* at 16A).

On October 9, 1985, the loan was accelerated and DOE paid the Federal Financing Bank the entire amount due, thereby becoming subrogated to the bank's rights against Great Plains (Pet. App. 4A).

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[1] The loan guarantee agreement, like the mortgage, expressly states that the parties' rights and obligations are to be determined in accordance with federal law (C.A. App. 84).

[2] Originally, Great Plains' $70,338,753.90 interest payment and $328,500,000 principal payment were due June 30, 1985, but the due date was extended until August 1, 1985 (Pet. App. 4A).

2. Respondents filed suit against petitioners in the United States District Court for the District of North Dakota seeking, inter alia, foreclosure of the mortgage, and moved for summary judgment. In an order dated January 14, 1986, the district court granted respondents summary judgment on the foreclosure count (Pet. App. 30A). The district court held inapplicable the North Dakota state law that provides a one-year post-foreclosure redemption period, during which the debtor is entitled to the "possession, rents, use, and benefits" of the foreclosed property (N.D. Cent. Code §§ 28-24-11, 32-19-18 (1974 & 1976)). The court applied the balancing test formulated in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979),[3] and concluded that, particularly in light of the express provisions of the mortgage agreement, state law was inapplicable (Pet. App. 23A-25A).

On June 30, 1986, the property was sold to the sole bidder, the United States, for $1 billion (Pet. App. 4A).[4]

3. The court of appeals affirmed the decision of the district court on different grounds.[5] Concluding that the Act provides "sufficient direction for a decision in this case," the appellate court found the *Kimbell Foods* balancing test inapplicable (Pet. App. 5A). The court noted that although redemption was not specifically mentioned in the Act, "Congress presupposed default and delineated the

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[3] The factors in that balancing test are (1) the federal program's need for a nationally uniform body of law, (2) whether the program's objectives would be frustrated by application of a state law, and (3) whether state commercial practice would be disrupted unfairly if a federal rule is applied (440 U.S. at 728-729).

[4] Prior to the foreclosure sale, the court denied Great Plains' motion, based on an asserted "equitable right of redemption," to amend the court's order to defer the sale for six months (Pet. App. 32A-39A).

[5] The court of appeals also affirmed, in a separate appeal, the district court's decision upholding the validity and enforceability of the Gas Purchase Agreement. See 819 F.2d 831 (1987).

DOE s rights in the event of default" (*id.* at 6A).[6] It then found that "[w]hereas under North Dakota law Great Plains, as debtor, would have certain superior rights to the property upon default, so the DOE under the Act, has rights to the property which are superior to all others" (*id.* at 7A).

4. The court of appeals' decision interpreting this little-utilized statute[7] is correct and does not conflict with

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[6] 42 U.S.C. 5919(g) provides in pertinent part:

> (1) If there is a default by the borrower * * * [the lender] shall have the right to demand payment of the unpaid amount from the Secretary. * * *
>
> (2) If the Secretary makes a payment under paragraph (1) of this subsection, the Secretary shall be subrogated to the rights of the [lender] * * * including the authority to complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such guarantee or related agreements, * * * without regard to the provisions of the Federal Property and Administrative Services Act of 1949, * * * or any other law, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property.
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> * * * * *
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> (4) * * * The guarantee agreement shall include such detailed terms and conditions as the Secretary deems appropriate to protect the interests of the United States in the case of default and to have available all the patents and technology necessary for any person selected, including, but not limited to the Secretary, to complete and operate the defaulting project. * * *

[7] The district court observed (Pet. App. 23A) that "the number of loans guaranteed under this program is apparently small," and petitioner itself recognizes that the case involves a "first-of-its-kind joint endeavor between government and private industry" (Pet. 17). There is no present prospect of any future such endeavors under this Act.

any decision of this Court or of any other court of appeals. It presents no issue warranting further review.

a. Petitioner contends (Pet. 15) that the court of appeals' decision is inconsistent with *United States* v. *Kimbell Foods, Inc., supra.* This contention is incorrect. In *Kimbell Foods,* the Court reaffirmed that "federal law governs questions involving the rights of the United States arising under nationwide federal programs" (440 U.S. at 726). Determining the content of that law depends on the particular program involved. When Congress has specified the rule to be followed, the inquiry is at an end—the statute must be applied. Only "absent a congressional directive," should courts engage in a balancing test to determine the applicability of state law. 440 U.S. at 740.

Applying these principles, the Court in *Kimbell Foods* found that no federal statute established priorities for contractual liens arising from certain loan programs administered by the Small Business Administration and the Farmers Home Administration (440 U.S. at 718, 727). In that situation, the Court found it necessary to formulate a balancing test, the application of which led to the conclusion that the content of the federal common law with regard to the priority of the liens under the lending programs there involved should be determined by reference to state law.

Plainly, the decision below does not conflict with *Kimbell Foods.* The court of appeals here had to determine the content of the governing federal law with respect to the question at issue in this case—the redemptive rights of a debtor who has defaulted on a loan guaranteed pursuant to the Federal Nonnuelear Energy Research and Development Act of 1974. As the court of appeals recognized, that Act does provide the clear "congressional directive" that was lacking in the statutes at issue in *Kimbell Foods.* The Act specifically provides that if the borrower defaults, and the DOE makes payment under its guarantee, it shall the authority to "complete, maintain,

operate, lease, or otherwise dispose of any [Project] property * * * without regard to * * * [40 U.S.C. 471 et seq.] * * * or any other law" (42 U.S.C. 5919(g)(2)), thus precluding the application of state-law-based limitations on DOE's authority. The Act also mandates that the rights of DOE shall be "superior to the rights of any other person" (42 U.S.C. 5919(g)(2)), rendering DOE's rights in a defaulted project under the Act superior to those of anyone else, including petitioner's asserted right to redemption under state law.[8] Finally, the Act expressly directs the DOE to include in the guarantee agreement "detailed terms and conditions * * * to protect the interests of the United States in the case of default." 42 U.S.C. 5919(g)(4). DOE carried out this statutory mandate by providing in the loan documents that federal law would apply and that the borrower waived any state law redemption rights.[9] In light of the clear congressional

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[8] Petitioner suggests (Pet. 14) that the statutory reference to the rights of any "other person" refers only to other creditors. That restricted reading is inconsistent with the plain statutory language. If Congress had intended to refer to other creditors, it could easily have done so. The district court's reluctance (Pet. App. 21A) to construe the reference to "any other law" as including state law similarly ignores the plain statutory language. Neither petitioner nor the district court refers to anything in the legislative history of this statute that casts any doubt on the plain meaning of either of these statutory terms. The post-enactment testimony of one federal official that petitioner refers to (Pet. 7) is, of course, inconsistent with the position the government has taken in this litigation and with the decision of the court of appeals.

[9] Petitioner's assertion (Pet. 3) that the availability under state law of a one-year post-foreclosure redemption period was a "premise" of the Project is inconsistent with these express contractual provisons. Petitioner's related suggestions (Pet. 7) that its contractual waiver was either "boiler plate" or ineffective are not persuasive. The mortgage at issue here was plainly not a standard form contract. Rather, it was carefully negotiated specifically for this multi-billion dollar project. See Pet. App. 24A. In any event, the purpose of the redemption

directive and DOE's compliance with that directive, the court of appeals correctly followed the decisional procedure established by *Kimbell Foods* and found state law was inapplicable.

b. Petitioner also contends (Pet. 16-17) that the court of appeals' decision conflicts with decisions of the First, Third, Seventh and Ninth Circuits construing quite different federal statutes established to protect large numbers of small borrowers and depositors.[10] Although in those cases the courts have refused to displace state law in the absence of an explicit congressional directive, there is at most a semantic disagreement with this case. Here, there are clear congressional directives that are inconsistent with application of the state law upon which petitioner relies.[11]

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period is to give the borrower the opportunity to reclaim the property if he pays the purchase price plus interest (N.D. Cent. Code § 28-24-02 (1974)). Petitioner has never suggested that it could pay DOE any sum remotely approaching the $1 billion purchase price. See Pet. App. 37A ("the defendants talk of 'redemption,' but it is apparent that 'renegotiation' would be a more accurate description"). Indeed, petitioner's proposals for restructuring the Project have never adequately recognized DOE's investment in the project. See Plaintiffs-Appellees' C.A. Addendum 31, 44. In its brief in the court of appeals, petitioner expressed concern about possible adverse tax consequences of the timing of the sale of the Project upon foreclosure in the absence of redemptive rights (see ANR Appellant's Br. 16 & n.*), but that concern is of course irrelevant to the legal issue here.

[10] See *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 708 F.2d 804 (1st Cir. 1983) (Housing and Urban Development mortgage insurance); *United States* v. *Walter Dunlap & Sons, Inc.*, 800 F.2d 1232 (3d Cir. 1986) (Farmers Home Administration loan); *United States* v. *Ellis*, 714 F.2d 953 (9th Cir. 1983) (same); *Federal Deposit Insurance Corp.* v. *Braemoor Associates*, 686 F.2d 550 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983) (Federal Deposit Insurance Act suit to recover bank assets); *United States* v. *Pastos*, 781 F.2d 747 (9th Cir. 1986) (Small Business Administration mortgage).

[11] Petitioner's claim (Pet. 15) that there is no inconsistency is incorrect. The Act expressly gives DOE the right, upon a default and pay-

Thus, there is no reason to believe that any other court would have reached a different result in this case than that reached by the Eighth Circuit here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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ment by DOE under the Loan Guarantee Agreement, to operate the Project or to dispose of it as it sees fit. The application of state redemption laws would defeat DOE's right to immediate possession and delay its ability to recoup its investment during the redemption period; such laws would make it difficult, if not impossible, to sell the Project before the right of redemption expired.

Contrary to petitioner's suggestion (Pet. 15), the court of appeals here did not recognize the existence of any right to redemption after default but before foreclosure. Instead, the court held (Pet. App. 8A) that there is no post-foreclosure right to redemption, and that the determination whether or not to grant a post-default period for redemption lies wholly within the district court's discretion—and thus that there is no post-default "right" to redemption. Indeed, the court of appeals upheld the district court's decision not to grant such a redemption period here. Accordingly, nothing in the court's discussion is inconsistent with its conclusion that the federal statutory scheme precludes the existence of a state-granted right to a post-foreclosure redemption period.

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